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Public Prosecutor v Mohd Roslan bin Desa & Anor

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COURT OF APPEAL (PUTRAJAYA)
MOKHTAR SIDIN, ZALEHA ZAHARI AND SURIYADI JJCA
25 MARCH 2009

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Criminal Law — Murder — Circumstantial evidence — Possession of items belonging to deceased and manner first respondent obtained them not proven — Failure to prove common interest — Whether fatal to prosecution

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The respondents were charged for the death of the Ooi Yean Wan ('the deceased'). The prosecution's case against the respondents rested on circumstantial evidence and the prosecution failed to admit the trial records 'ID39' of another case involving the first respondent. The prosecution relied on inference that the first respondent stole the deceased's car after she was killed or the probability that a third party had sold the deceased's car to the first respondent. The absence of motive and lack of evidence as to how the deceased was killed were factors taken into consideration by the learned High Court judge. Both the respondents were acquitted and discharged on the prosecution's failure to prove prima facie case against them. The prosecution argued in its appeal that the learned High Court judge failed, inter alia; (i) to admit the first respondent's ID39 when he pleaded guilty to an offence under s 304 of the Penal Code; (ii) to consider the relevance and admissibility of ID39 pursuant to s 14 and s 15 of the Evidence Act 1950 and infer the first respondent committed robbery and caused the death of the deceased as the first respondent had custody of the deceased's car on 24 December 1998 soon after her death.

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Held, dismissing the appeal:

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(1) The test relied by the learned High Court judge in not admitting the trial records of another case involving the first respondent was correct. When a person is charged with a criminal offence, evidence that he had on other occasions been guilty of a behaviour indicating a criminal disposition is ordinarily inadmissible. It is inadmissible because it is likely to proceed upon prejudice rather that proof referred (see para 7). *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 (SC).

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(2) The evidence that the prosecution sought to adduce as 'similar fact' did not reveal features of such striking similarity as to be of positive probative value. The similarities raised related to the surrounding circumstances by itself cannot by themselves lead to the conclusion that it was the first respondent who committed the offence of which he now stands charged. The learned High Court judge in the circumstances was correct taking

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into consideration the fact that possession of items was belonging to the deceased and the manner of how the first respondent obtained items belonging to the deceased had not been proven, as well as the absence of evidence how the deceased was killed. The evidence adduced by the prosecution merely invited the court to infer that it was the first respondent who stole the deceased's car after the deceased was killed or the probability that a third party had sold the deceased's car to the first respondent. The prosecution's failure to prove common intention was fatal (see para 13).

[Bahasa Malaysia summary

Responden-responden telah dituduh kerana kematian Ooi Yean Wan ('si mati'). Kes pendakwaan terhadap responden-responden berdasarkan keterangan mengikut keadaan dan pendakwaan gagal menerima rekod-rekod perbicaraan 'ID39' tentang kes lain yang melibatkan responden pertama. Pendakwaan bergantung kepada inferens bahawa responden pertama telah mencuri kereta si mati setelah dia dibunuh atau kebarangkalian bahawa pihak ketiga telah menjual kereta si mati kepada responden pertama. Ketiadaan motif dan kekurangan bukti tentang bagaimana si mati telah dibunuh merupakan faktor-faktor yang telah dipertimbangkan oleh hakim Mahkamah Tinggi. Kedua-dua responden telah dilepas dan dibebaskan kerana pendakwaan gagal untuk membuktikan kes prima facie terhadap mereka. Pendakwaan berhujah dalam rayuannya bahawa hakim Mahkamah Tinggi telah gagal untuk, antara lain: (i) menerima ID39 responden pertama apabila dia mengaku bersalah kerana kesalahan di bawah s 304 Kanun Keseksaan; (ii) untuk mengambilkira kaitan dan kebolehterimaan ID39 menurut s 14 dan s 15 Akta Keterangan 1950 dan membuat inferens yang responden pertama telah melakukan rompakan dan menyebabkan kematian si mati kerana responden pertama mempunyai jagaan kereta si mati pada 24 Disember sejurus selepas kematiannya.

Diputuskan, menolak rayuan:

(1) Ujian yang digunapakai oleh hakim Mahkamah Tinggi untuk tidak menerima rekod-rekod perbicaraan kes lain yang melibatkan responden pertama adalah betul. Apabila seseorang itu dituduh dengan kesalahan jenayah, keterangan bahawa dalam kejadian lain dia telah didapati bersalah berdasarkan kelakuannya yang menunjukkan perlakuan jenayah dalam keadaan biasa tidak boleh diterima. Ia tidak boleh diterima kerana besar kemungkinan ia berlandaskan prasangka dan bukan bukti (lihat perenggan); *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217, MA, dirujuk.

(2) Keterangan yang cuba dikemukakan oleh pihak pendakwaan sebagai 'similar fact' yang tidak menunjukkan cirri-ciri persamaan ketara sebagai suatu yang mempunyai nilai probatif yang positif. Persamaan yang

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ditimbulkan berkaitan dengan keadaan sekeliling yang dengan sendiri tidak boleh disimpulkan bahawa responden pertamalah yang telah melakukan kesalahan yang dia dipertuduhkan di sini. Hakim Mahkamah Tinggi dalam keadaan sedemikian adalah betul untuk mengambilkira tentang fakta bahawa milikan item-item itu merupakan milik si mati dan cara bagaimana responden pertama mendapatkan item-item milik si mati tidak dibuktikan, dan juga ketiadaan bukti tentang bagaimana si mati dibunuh. Keterangan yang dikemukakan oleh pendakwaan hanya memberi mahkamah inferens bahawa responden pertama yang mencuri kereta si mati setelah si mati dibunuh atau kebarangkalian bahawa pihak ketiga telah menjual kereta si mati kepada responden pertama. Kegagalan pendakwaan membuktikan niat bersama adalah memudaratkan (lihat perenggan 13).]

Notes

For cases on circumstantial evidence, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1348–1351.

Cases referred to

Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Makin v Attorney General for New South Wales [1894] AC 57, PC (refd)
R v Raju & Ors v R [1953] MLJ 21 (refd)
Reg v Boardman [1975] AC 421, HL (refd)

Legislation referred to

Evidence Act 1950 ss 11, 14, 15
Penal Code s 304

Appeal from: Criminal Trial No 45–21 of 2001 (High Court, Alor Setar)

Nurulhuda bt Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.
Mohd Radzuan bin Ibrahim (Jamal bin Abas with him) (Radzuan Ibrahim & Co) for the respondents.

Zaleha Zahari JCA (delivering judgment of the court):

[1] The High Court judge's finding at the close of the prosecution's case was that the prosecution had failed to prove a prima facie case against both of the respondents and acquitted and discharged them. The unanimous decision of this court was to dismiss this appeal and to affirm the decision of the High Court judge for the following reasons.

[2] The charge preferred against the respondents was as follows:

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Bahawa kamu bersama-sama di antara 23.12.1998 jam lebih kurang 9.00 MALAM hingga 24.12.1998 jam lebih kurang 5 petang di antara Jalan Solok Sembilan, Seberang Jaya, Butterworth, Pulau Pinang hingga ke suatu kawasan parit di Kampung Padang Buluh, Tikam Batu, Kuala Muda, Kedah Darul Aman telah dengan sengaja membunuh seorang perempuan Ooi Yean Wah K.P. No. 741119-07-5340 dengan itu kamu telah melakukan kesalahan yang boleh di hukum dibawah Seksyen 302 Kanun Keseksaan yang dibaca bersama-sama dengan seksyen 34 Kanun Keseksaan.

[3] The fact that the person named in the charge, Ooi Yean Wah ('the deceased'), had died has been proved by the evidence of the father and mother of the deceased (SP16 and SP17 respectively). There is also the testimony of Dr Bhupinder Singh, the Consultant Forensic Pathologist (SP23) who conducted the post mortem, who testified that the cause of death of the deceased was fracture of the second and third cervical spine. He also testified that there was also a penetrating injury to left iliac crest of 2cm depth.

[4] The prosecution's case against the respondents rests on circumstantial evidence. The prosecution's attempt to admit the trial records of another case involving the first respondent (ID39) was not allowed by the trial judge. The reasoning of the trial judge in arriving at the conclusions which he did may be summarised as follows: Possession of items belonging to the deceased and the manner of how the fist respondent obtained such items had not been proved. The absence of motive, as well as the absence of any evidence as to how the deceased was killed were factors taken into consideration. Based on the evidence before him, they merely invited the court to infer that it was the first respondent who stole the deceased's car after she was killed, or, the probability that a third party had sold the deceased's car to the first respondent. The prosecution's failure to prove 'common intention' was significant. The trial judge ruled that the probability of either one of the respondents being the person who killed the deceased was insufficient for the court to conclude that the respondents were the persons who killed the deceased. He then concluded that the prosecution had failed to prove a prima facie case against the respondents and acquitted and discharged them.

[5] The DPP's arguments in this appeal focused on the High Court judge's decision in not admitting ID39, the trial records involving the first respondent to which he had pleaded guilty for an offence under s 304 of the Penal Code, ie that of causing the death of a female Chinese on 11 December 1998. The DPP submitted that earlier case had the following similarities to the facts of this case. The first respondent had in that earlier case admitted to puncturing the tyre of his victim's car; that on the pretext of helping his victim, to having

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robbed the victim, and thereafter in driving away in the victim's car. According to the facts in ID39, in the course of committing the robbery, the victim was killed.

[6] The DPP submitted ID39 was relevant and admissible pursuant to ss 14 and 15 of the Evidence Act 1950, to show 'modus operandi'. She submitted that had the trial judge admitted ID39, the judge should then have made the following inferences. That this was not just an ordinary case of a theft of a motor vehicle. That the person who took the deceased car was the person who had killed her. The injuries inflicted on the deceased was by the use a weapon, such as a knife. On the facts of this case, there is the testimony of SP11 that the first respondent had used a knife in puncturing the tyre of the deceased's car. The DPP submitted the trial judge should have then further inferred that the person who committed these acts was the first respondent as he had custody of the deceased's car on 24 December 1998, soon after her death. Also significant, was the evidence the first respondent meeting SP6 to make a false number plate to replace the existing number plate of the deceased's car.

[7] The tests which have to be applied on the correctness of the decision of the High Court judge in not admitting ID39 in this case as laid out by the authorities cited before us are clear: When a person is charged with a criminal offence, evidence that he had on other occasions been guilty of behaviour indicating a criminal disposition is ordinarily inadmissible. It is excluded because it is likely to be regarded as proving too much, and is for that reason likely to proceed upon prejudice rather than proof. In discussing ss 14 and 15 of the Evidence Act 1950, the Malaysian courts have relied on the Privy Council's decision of *Makin v Attorney General for New South Wales* [1894] AC 57 at p 65. In *Makin*, the issue before the Privy Council was whether it was wrong to admit evidence of the finding of other bodies other than the body of the child alleged to be Horace Amber Murray (deceased). The Privy Council laid down the propositions in relation to the application of 'similar fact' evidence as follows:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

[8] The Privy Council further states:

> On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or

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A accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

B **[9]** In *Reg v Boardman* [1975] AC 421 at p 461 Lord Salmon states:

> … evidence against an accused which tends only to show that he is a man of bad character with a disposition to commit crimes, even the crime with which he is charged, is inadmissible and deemed to be irrelevant in English law … To admit such evidence would be unjust and would offend our concept of a fair trial to which we hold that everyone is entitled. Nevertheless, if there is some other evidence which may show that an accused is guilty of the crime with which he is charged, such evidence is admissible against him, notwithstanding that it may also reveal his bad character and disposition to commit crime.

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D **[10]** In *R v Raju & Ors v R* [1953] MLJ 21, at p 22 Spenser Wilkinson J ruled:

E > Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive:
>
> 1. To negative accident;
> 2. To prove identity;
> 3. Where mens rea is the gist of the offence, to prove intention; and
> 4. To rebut a defence which would otherwise be open to the accused.
>
> In my opinion it is of the greatest importance when evidence of this kind is tendered that the prosecution should tender it for a specific purpose and that, if it is admitted, it should be made quite clear for what purpose it is admitted.

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G **[11]** The propositions laid down in *Makin* and *Boardman* has been recognised by the Malaysian courts. In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217, at p 218 the Supreme Court relied on Lord Morris's judgment in *Boardman* and held:

H > (4) Where the purpose of adducing evidence of similar facts or similar offences was justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise have been open to the accused (in addition to those under ss 14 and 15 of the Evidence Act 1950), evidence of bad character was admissible in evidence, provided that the probative value of such evidence outweighed its prejudicial effect. There must be a real anticipated defence to be rebutted and not merely crediting the accused with a fancy defence. Here, the evidence of the physical possession of the revolver by another person during the earlier robbery was vital to the defence and relevant under s 11 of the Evidence Act 1950 to cast a reasonable doubt on the

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prosecution case that the accused was in possession of the revolver at the time of the arrest. Therefore, the prosecution was entitled to adduce evidence to rebut such a defence.

[12] The issue in this case is whether the similarities relied upon by the prosecution were unique or striking to reveal an underlying link between the matters with which it deals, and the allegations against the respondents upon the charge under consideration such that common sense makes it inexplicable on the basis of coincidence. This task is ultimately one of judgment. It must go beyond showing a tendency to commit crimes of this kind. It must be positively probative in regard to the crime now charged.

[13] We are in agreement with the trial judge's assessment that properly considered the evidence which the prosecution seeks to adduce as 'similar fact' did not reveal features of such striking similarity as to be of positive probative value. The similarities raised relates to the surrounding circumstances. Causing the victim's tyre to deflate, of subsequently rendering assistance by changing the affected tyre, these features by itself in our view cannot by themselves lead to the conclusion that it was the first respondent who committed the offence of which he now stands charged. The learned judge was clearly in the circumstances of this case right in taking into consideration the fact that possession of items belonging to the deceased and the manner of how the first respondent obtained such items had not been proved, as well as the absence of evidence as to how the deceased was killed. We agree with his finding that the evidence adduced merely invited the court to infer that it was the first respondent who stole the deceased's car after the deceased was killed, or, the probability that a third party had sold the deceased's car to the first respondent. We agree that the failure to prove common intention was fatal.

[14] In these circumstances the appeal was dismissed. The High Court judge's decision in acquitting and discharging the respondents was affirmed.

Appeal dismissed.

Reported by Mashrifah Ravendran